93-546

Supreme Court
FILED
AUG 16 1993

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

KENNETH L. MUSSLYN
PETITIONER

VS.

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH L. MUSSLYN
6901 RAYTOWN RD.
RAYTOWN, MO 64133

QUESTIONS PRESENTED

Was Defendant entrapped?

Was Defendant a victim of a sting operation?

Is Defendant's case identical to Jacobson?

Was Defendant predisposed to commit a crime?

NO._____

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OF THE
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KENNETH L. MUSSLYN,
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VS.

UNITED STATES OF AMERICA,
RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, Kenneth L. Musslyn, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit refusing to overturn Petitioner's conviction for the violation of His Fourth Amendment Rights.

OPINIONS BELOW

The opinion of the Supreme Court of The United States as reported in Jacobson_V._U.S., 112 S. CT. 1535, and appears as Appendix A of this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on April 2,1993. A Petition for rehearing was not filed on this matter. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth and Fifth Amendment of the Constitution of the United States as set fourth in Appendix (A).

STATEMENT OF THE CASE

The United States District Court, Western District of Missouri, Western Division, Had jurisdiction pursuant to Title 18 U.S.C. 1291.

On May 19, 1988, Petitioner was sentenced to Six years (6) imprisonment Pursuant to Title 18 Sec 2252 (a).

Petitioner has served the term of imprisonment and is currently serving the term of parole in Raytown, Mo., Under the supervision of the Federal Parole and Probation Dept.

On the ill advice of his attorney Petitioner entered a conditional plea Under Rule 11 (A) (2).

On 6/15/88 Petitioner was delivered to the Medical Center for Federal Prisoner's in Springfield, MO.

On 5/31/88 Petitioner's attorney filed a Notice of Appeal and later filed the appeal brief and that appeal was denied on the proposition that Petitioner was predisposed to commit.

On 8/25/88, Petitioner's attorney filed a Motion to reduce Sentence and that motion was denied.

On 6/26/89, Petitioner in pro se filed a Motion to Dismiss Sentence for Lack of Jurisdiction and that motion was denied.

On 8/28/89, Petitioner filed a Notice of Appeal and on 12/7/89, that appeal was denied.

3/21/90, Petitioner filed a Motion For A New Trial and on 9/28/90, that motion was denied.

On 10/12/90, Petitioner filed a Notice of Appeal and Honorable D. Brook Bartlett denied the Notice of Appeal claiming that the Notice of Appeal was untimely.

On 10/15/90, Petitioner petitioned the Eighth Circuit Court of Appeals requesting that a Writ of Mandamus be issued in his favor and that petition was denied.

Petitioner from the very beginning on this

long fought case has maintained that he was entrapped, enticed, and that his Fourth and Fifth Amendment Rights were violated. And now today some five years later petitioner has served the term of imprisonment and he still contends the same claim and is fighting the same battle that he was five years ago. In most every case. Where a person is truly guilty and after the sentence has been served they go about their merry way and get on with their life. That is not the case at hand in this matter before this Honorable Supreme court. Over the last five years Petitioner has spent thousands of dollars and uncountable research hours in an effort to win his cause. Surely the Court must give ear to some kind of validity in his claim.

All throughout the last five years Petitioner has tried to convince the lower court's that his claim of enticement and entrapment is a valid claim.

Also during the last five years Petitioner has kept track of another individual that was also convicted of Title 18 Sec 2252 (a). That individuals case was overturned right here in this Honorable Court Jacobson v. U.S., 112 S CT. 1535. This case and the Musslyn case are identical. The government spent two years in a sting operation mailing out child pornography literature to Jacobson and finally after two years of enticement Jacobson ordered the literature. After the delivery of the material the government agents armed with a search warrant raided the Jacobson residence and retrieved the material they had delivered some two hours earlier.

The Musslyn case is identical in circumstance except for the fact that the government spent TEN (10) years of mailing literature before he finally ordered their material. Also armed with a warrant they raided the Musslyn residence confiscated the material and placed Musslyn under arrest.

The government spent many hours and many years, not to mention the thousands of dollars that they invested in their sting operation. The government was forced to show something for their efforts, so they finally enticed Musslyn into ordering some of the material from them.

Before Musslyn's arrest he was employed by the Burlington Northern Railroad for twenty two (22) years. His employment with them for the twenty two years was unmarked with any wrong doing. He was considered a trustworthy employee and was well liked by his piers.

Also Musslyn was a roller skating instructor for more than twenty years for the Winnwood Skate Club and also four other skate clubs. During his skating instructor years he had taught more than twenty thousand (20,000) children and adults to skate. Not one time during those years of skating instructions to thousands of children and young adults did Musslyn ever make an attempt to molest one of them, nor did he ever have any incident that would bring shame upon his well respected reputation.

Musslyn, also owned property in the Raytown area and not one of his neighbors has anything bad to say about him. He was and is a hard working and

a productive citizen yet today in spite of all that he has endured over the last five years.

In the District Court the prosecutor for the government, in her statement to the grand jury, she stated that Musslyn was the object of a sting operation and since that time and since the time that this point has been pointed out to the court's she has refrained from saying that. Could it be that Musslyn was the object of sting operation, bent on convicting anyone that happened to be in the way and they had to make a showing for the money that had been spent ?

The government claims that Musslyn had a predisposition to commit the crime, however the predisposition they had used against Musslyn happened ten (10) years earlier. What the government failed to disclose to the court was the fact that the female in question had lied about her age. Even the arresting officer concluded that the young woman looked much older than she was. How was Musslyn to know ? Are citizens to ask every acquaintance for identification ?

Whatever the questions are in this case, the million dollar question is, would this case now be before this Honorable Court had the government not mailed it's literature to targeted individuals?

REASONS FOR GRANTING THE WRIT

The Jacobson case was overturned because of,

ENTRAPMENT= The government failed as a matter of law to establish that a defendant charged with receiving child pornography through the mails was independently predisposed to commit the crime, where the defendant ordered magazines depicting child pornography through the mail only after two years of receiving communications from the government agents acting through various fictional organizations that probed his interest in sexually explicit materials that involved minors, promoted sexual "freedom" in that area, and solicited his order of publications involving such material, after the agents' suspicions had been triggered by information that the defendant had once ordered magazines depicting nude boys at a time when such materials were not illegal. Jacobson V. U.S., 112 S. CT 1535.

Jacobson was pursued by agents for two years but Musslyn was pursued for TEN years. Jacobson's case came to light because he had once

ordered such material, and Musslyn's case also came to light in the same fashion.

The government claims that Musslyn was predisposed to commit the crime. How did the government know what was in Musslyn's mind? Can anyone say for a certainty that Musslyn was thinking or planning to commit a crime. Musslyn was with the understanding that the company he was ordering from was a legal firm and that the material he was ordering from them was within the scope of federal regulations and if they were not within the federal guidelines they surely would not mail them to him.

Another fact that must be explored here, if Musslyn was guilty of ordering such material, then the government must also be guilty of participating in a crime also.

Where the government knows that the defendant has committed no crime, is not planning to commit a crime and has not engaged in any criminal activity, whether the government needs some cause or reason to make Musslyn a target for ten years and to entice and lure him for ten years to commit the offense for which he has served a prison sentence, the government has far overstepped it's bounds and entered into the realm of entrapment and enticement. The materials that Musslyn purchased through the mails were manufactured and sold by the government through various fictional companies. Had the government not mailed it's literature to Musslyn to begin with this case would not be in this Honorable Court.

United States v. Kaminski, 703 F 2d 1004, 1010 (7th. Cir. 1983) (Posner,J., concurring).

In my view, the government's investigation of Jacobson amounts to the deliberate manufacture of a crime that would nev r have occurred but for the Postal Service's over zealous efforts to create it. Jacobson's conviction should be reversed.

The government in Musslyn's case used an incident some ten years earlier to establish predisposition and that case involved a young woman who had lied to Musslyn about her age. Musslyn engaged in sexual activity with her. This case is no way similar to that of child pornography. One thing that the Court must take note of, since the incident with the young woman Musslyn has not committed any other offense during a ten year period and during that ten year period he has taught 20,000 young adults to roller skate and all during that ten years of roller skating instructions not one incident or mark against his good character was ever reported by anyone.

For ten long years Musslyn was a law abiding citizen and a productive citizen, until the government began it's mailing to him. This case is identical in every respect to that of Jacobson. The government spent twenty seven months mailing their illegal mail to Jacobson and finally after twenty seven months Jacobson finally ordered from them. Both defendant's became a victim, only after the government enticed them and played them like a musical instrument.

In reality the government entrapped them

and in Sherman V. United States, 356 U.S. 369, 2 L.Ed. 848, 853. In the language of Chief Justice Warren,

That the government was required to offer more than evidence of "the weakness of an innocent party" to overcome the defense of entrapment. Since there was no objective evidence from which rational minds could conclude that the defendant had committed a crime, was committing a crime or was likely to commit one when petitioner was the subject of Project Looking Glass, petitioner alleged that he was entitled to summary acquittal under such prior Eighth Circuit cases as United States V. Laird, 743 F.2d 674(C.A. 8, 1978) and United States V. Dion, supra.

Musslyn now argues that in order for predisposition to stand the government must show that the defendant had committed a crime, was about to commit a crime or was engaged in the course of criminal conduct.

If the government contends to hold to the incident that happened ten years earlier they would be violating Musslyn's due process rights and his equal protection rights afforded him under law and in holding to that incident, ten years earlier, the government would also infringe upon the double jeopardy clause of the Amendment Rights. As it stands Musslyn is being twice penalized for an infraction that he has already paid for.

Had the government not made the first move in Jacobson and Musslyn neither would have had to endure trial and imprisonment and not to

mention all of the other variables involved in this case.

In the Ninth Circuit, United States V. Lutrell, 889 F.2d 806 (C.A. 9, 1989) rehearing en banc granted 906 F.2d 1384 (1990) We think police officers violate constitutional norms, when without reasoned grounds, they approach apparently innocent individuals and provide a specific opportunity to engage in criminal conduct.

There was no evidence to conclude that Musslyn had committed a crime or was about to commit a crime. The government made the first move in this whole charade. Musslyn had been a law abiding citizen for ten years since the incident and that incident was a mistaken identity. Musslyn had worked for the Burlington Northern Railroad for more than twenty two years and was a skating instructor, with more than 20,000 children and young adults as his students and not one incident ever occurred. This is certainly not the profile of a child molester and it is not the profile of a deviate sexual offender.

Musslyn like Jacobson has established a foundation for entrapment and the evidence produced in this Petition clearly shows that he was entrapped. Speaking on entrapment, in Sorrels V, United States, supra, that the entrapment defense was available to the accused not on a constitutional grounds but as a matter of statutory construction.

Mr. Justice Roberts, concurring, thought that the judgment should be reversed with instructions to squash the indictment. He said,

The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents.

In Hampton V. United States, 425 U.S.484, 48 L.Ed 2d113, 96 S. Ct.1646 (1976)

If the result of government activity is to " implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission.. Sorrells, supra, at 442, the defendant is protected..." So defendant is protected by a judicially fashioned rule to enforce a statutory limitation.

The Court should grant certiorari here explicitly because of the strong overshadowing of the Jacobson case and the exactness of both cases.

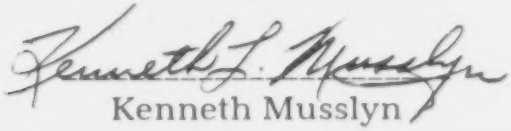
Musslyn is protected by entrapment and the Court should grant certiorari because of the Hampton case and its ruling.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court Of Appeals in this matter.

Dated July 22,1993

Respectfully Submitted



Kenneth Musslyn

AFFIRMATION OF SERVICE

Under the penalty of perjury I have mailed a true copy to the following.

United States Attorney
1201 Walnut
Kansas City, MO 64106

Solicitor General
Department of Justice
Washington, D.C. 20530

Dated 9-28- 1993

Respectfully Submitted

Petitioner

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APPENDIX A

See Jacobson Case

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KENNETH MUSSLYN,	)	Case No.
Movant.	)	92-0784-CV-W-9-P
	)	
vs.	)	Crim. No.
	)	87-0266-01-CR-W-9
UNITED STATES OF AMERICA,	)	
Respondent.	)	

ORDER DENYING SECTION 2255 MOTION

Movant, Kenneth L. Musslyn, has filed pro se what is construed to be a motion pursuant to 28 U.S.C. § 2255. Movant seeks to overturn the sentence imposed upon him in United States v. Musslyn, Case No. 87-0266-01-CR-W-9 (W.D. Mo. 1988), aff'd, 865 F.2d 945 (8th Cir. 1989). In that case, movant entered a conditional guilty plea for unlawfully receiving child pornography in violation of 18 U.S.C. § 2252 (a) (2). Movant was sentenced to six years imprisonment, and a $50.00 special assessment was imposed. Movant has served the term of imprisonment and is now on supervised parole.

Movant asserts that he was entrapped and enticed into committing the act for which he was convicted and sentenced. He contends that he entered his conditional plea without a confession of guilt in order to minimize the sentence, but that he always has asserted that he was entrapped. Musslyn relies on Jacobson v. United States, _____ U.S. _____,

112 S.Ct. 1535 (1992). Movant contends that he is innocent of the charges brought against him and that he will continue to suffer from the stigma of his convictions. Thus, he requests that his claim be reviewed in the interest of justice that his sentence be overturned.

In his direct appeal, movant raised a claim that his due process rights were violated by outrageous governmental conduct. In the course of deciding that claim, the United States Court of Appeals for the Eighth Circuit reviewed the facts of movant's case, including (1) his predisposition to order child pornography; (2) his completed application for membership in the sting operation and identified himself as a person interested in sexual material involving preteen children; (3) his follow up on his application with a letter requesting their current issue; (4) his meeting and correspondence with a postal agent about child pornography and his sexual experiences with children; (5) his submission of a second application to another undercover postal operation indicating a strong interest in preteen sex and "family love"; and (6) the fact that he "entered a plea of guilty in September of 1976 to charges arising out of an incident where [he] was photographed having oral sex with a 13-year-old girl." United States v. Musslyn, 865 F.2d at 946.

The Eighth Circuit Court of Appeals concluded that:

> Musslyn was clearly predisposed to collect child pornography and engage in sexual acts with

> children. The government acted only in concert with Musslyn's request. Nobody forced Musslyn to join CSF or to order the illegal materials. The government did nothing more than give Musslyn an opportunity to exercise his predisposition to collect child pornography. Steps taken by the government in its undercover sting operation are reasonable and not outrageous considering the nature of the crime. The nature of the production, distribution, and sale of child pornography itself justifies this type of undercover operation to be utilized against those who order it. Accordingly, this Court holds that the government's conduct is not outrageous and did not violate Musslyn's right to fundamental fairness.

Id. at 947.

Movant subsequently filed a motion to dismiss the sentence imposed upon HIM for lack of jurisdiction (denied August 15, 1989), a motion for reduction of his sentence pursuant to Fed. R. Crim. P. 35(b) (denied October 11, 1989), and a motion for new trial (denied March 23, 1990). In his motion for new trial, movant raised an entrapment claim. He argued that he was entitled to a new trial based on the Eighth Circuit ruling United States v. Jacobson, 893 F.2d 999 (8th Cir. 1990), because he was entrapped by a sting operation with the same defects as in Jacobson. In denying movant's motion for new trial, I cited the Eighth Circuit Court of Appeals' previous opinion finding that movant was predisposed to ordering child pornography. I concluded that movant's outrageous government conduct defense, which is closely related to entrapment, had been rejected both by me and by the Eighth Circuit Court

of Appeals and that movant was not entitled to a second bite of the apple. Movant's appeal of the denial of his motion for new trial was dismissed as untimely by the Eighth Circuit on May 31, 1991.

"[M]ovant cannot raise the same issues in a § 2255 petition that have been decided on direct appeal or in a new trial motion." United States v. Kraemer, 810 F.2d 173, 177 (8th Cir. 1987) (per curiam) (citing United States v. Gaus, 751 F.2d 1506, 1507 (8th Cir. 1985 (per curiam) and United States v. Sanders, 723 F.2d 3436 (8th Cir. 1983) (per curiam)). See also Dall v. United States, 957 F.2d 571, 572 (8th Cir. 1992); McCabe v. Callahan, 894 F.2d 994, 995 (8th Cir. 1990).

Because Musslyn's claim that the government conduct in this case was so outrageous as to result in violation of his due process rights is essentially the same as the entrapment argument advanced here and because Jacobson v. United States, supra, does not entitle movant to relief, it is ORDERED that this case is dismissed with prejudice.

D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
Dated:

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Case Title	) Docket Number
KENNETH MUSSLYN,	) 92-0784-CV-W-9-P
Movant	)
	)
vs.	) Name of Judge or
	) Magistrate
UNITED STATES OF AMERICA,	)
Respondent.	) D. Brook Bartlett

( ) JURY VERDICT. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered is verdict.

(X) DECISION OF THE COURT. This action came for consideration before the Court and the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

this case is dismissed with prejudice. (DBB) (dw)

Entered on Sep. 17, 1992

Clerk

ROBERT F. CONNER Date Sep. 17, 1992

(By) Deputy Clerk

D.M. WEINZERL

APPENDIX C

United States Court of Appeals
For The Eighth Circuit

No. 92-3485

Kenneth L. Musslyn, Appellant, v. United States of America, Appellee.	Appeal from the United States District Court for the Western District of Missouri. [UNPUBLISHED]

Submitted: March 31, 1993

Filed: April 2, 1993

Before BOWMAN, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Kenneth L. Musslyn appeals from the District Court's[1] denial of his motion to vacate his sentence under 28 U.S.C. § 2255 (1988). We affirm.

In 1988 Musslyn entered a conditional plea of guilty to unlawfully receiving child pornography in

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[1]The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

violation of 18 U.S.C. § 2252 (a) (2) (1988) and was sentenced to six years in prison. We affirmed the conviction. United States v. Musslyn, 865 F.2d 945 (8th Cir. 1989)(per curiam). Musslyn, who is currently on supervised release, recently filed this motion claiming that he was entrapped to commit the offense through the government's use of an undercover sting operation.

We conclude that Musslyn waived this entrapment argument by entering a guilty plea. See United States v. Calva, 979 F.2d 119, 123 (8th Cir. 1992). Even if this claim has not been waived, however, Musslyn could not prevail. A successful entrapment defense requires a showing that the defendant was not predisposed to commit the offense, see United States v. Gullickson, 982 F.2d 1231, 1235 (8th Cir. 1993), and we held on direct appeal that Musslyn was predisposed to order and collect child pornography. Musslyn, 865 F.2d at 946-47

Accordingly, the decision of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT.